



November 16, 2004

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

*Re: WC Docket No. 04-313, CC Docket No. 01-338; Triennial Review
Remand Proceeding*

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, CompTel/ASCENT ("CompTel") hereby gives notice that on November 15, 2004, its representative met with Scott Bergmann, Legal Advisor to Commissioner Adelstein. In this meeting, CompTel explained that it would be appropriate for the FCC to retain the high-capacity loop and transport impairment presumptions and tests from the original Triennial Review Order. CompTel also explained that the notion of "contestability" raised by the D.C. Circuit as a basis for overturning the FCC's presumption of nationwide impairment for transport in the USTA II decision was easily rebutted by record evidence in the instant proceeding.

Specifically, several facts prevent the FCC from drawing any inference of contestability from the presence of alternative facilities on some routes. First, the notion of "addressable markets" (determined by reference to an access line count of offices on both ends of a route) that could attract competitive entry, if large enough, is simply fallacious in light of record evidence demonstrating that investors will no longer speculatively finance facilities. Thus, even if access line counts were an accurate proxy for an "addressable market"—which they are not due to the sheer number of circuits under special access tariffs with anticompetitive provisions that discourage switching to alternative access facilities—investors will only fund builds where a competitive facilities provider actually *has* a contract for a requisite amount of business along a route. In these cases, the capacity limits on the availability of transmission UNEs in the TRO adequately

ensure that the ILEC will not have to provide access to high-capacity transmission UNEs where the competitive carrier could economically deploy their own facilities.

Finally, the existence of alternative transmission facilities on any given route cannot be deemed evidence that entry barriers have been surmounted on that route, or any route with similar characteristics. The Commission cannot make such an inference, because of the sheer numbers of carriers that deployed alternative fiber facilities that have been restructured through bankruptcy. Carriers operating their own fiber facilities that have been through bankruptcy, or other restructurings where debt has been eliminated, were clearly *not* able to overcome the barriers to entry in sufficient time to achieve minimum viable scale. Thus, their existence cannot, in the vast majority of instances, be used to infer that entry barriers were ever overcome, even on the routes where facilities have been deployed, much less on any other routes where there are currently no competitive fiber providers.

During the meeting CompTel handed out a copy of its October 12, 2004 presentation to the Wireline Competition Bureau. This document is included as an attachment to this letter. Representing CompTel was the undersigned attorney.

Sincerely,

A handwritten signature in black ink, reading "Jonathan D. Lee". The signature is written in a cursive, flowing style with a large initial 'J' and 'L'.

Jonathan Lee
Sr. Vice President
Regulatory Affairs

CompTel/ASCENT TRO Remand Presentation

October 12, 2004

Impairment Standard

- The DC Circuit asked for the FCC to clarify its standard that UNEs be available when entry would otherwise be uneconomic.
“Uneconomic by whom?”
- The concept of minimum viable scale, embedded in the FCC’s Guidelines-based standard, is the key to answering this question.

Impairment Standard

- Minimum Viable Scale is the minimum scale of entry at which an efficient entrant could sustain a viable (as distinguished from profitable) presence in the market.
- Thus, if it is unlikely that a competitor could capture enough demand to reach the point of being cash-flow neutral (a proxy for $\text{avg. revs} = \text{avg. costs}$) in some reasonable time period, then the requesting carrier is impaired without access to UNEs.

Impairment Standard

- The virtue of using a modified form of MVS as a proxy for efficient entry is that the FCC implicitly conducted this analysis already when it developed the capacity-based presumptions in the TRO impairment tests for high-cap loops and transport.
- The incorporation of the MVS standard would, by recognizing that past investment does not necessarily mean that entry barriers have been eliminated, justify the continuation of the FCC's nationwide impairment presumptions.

Competitor-Specific Impairment

- In analyzing impairment from the standpoint of the services a competitor seeks to offer, the FCC should acknowledge at least 3 classes of competitors, all of which are impaired in their ability to enter markets and expand their businesses without access to critical UNEs:
 - Retail Mass-Market Competitors
 - Retail Enterprise Competitors
 - Wholesale, Exchange Access Competitors

Retail Mass Market Competitors

- Retail Mass Market Competitors Are Impaired Without Access to:
 - Switching
 - Analog and DS0 Loops
 - Line Sharing (High Frequency Portion of Loop)
 - Line Splitting
 - Performance metrics are needed to ensure line splitting is viable
 - High Cap Transport

Retail Enterprise Competitors

- Competitors Serving the Retail Enterprise Market Are Impaired Without Access to:
 - DS1/DS3 Loops, regardless of transmission media
 - DS1/DS3 Transport, regardless of transmission media
 - Dark Fiber accessible at any technically feasible point, between any two points in the ILEC network

Wholesale Exchange Access Competitors

- Development of this market segment is critical to the development of meaningful inter, and intra, modal competition.
- Wholesale competitors are impaired without access to:
 - Dark Fiber
 - DS1/DS3 Loops and Transport

Sources of Impairment-Retail Mass Market Competitors

- Retail Mass Market Competitors:
 - Switching: Hot Cut Issue Is Critical
 - AT&T's \$11B asset write-down is dispositive evidence that competitors cannot reach minimum viable scale in mass markets without access to switching
 - Analog Loops and Hi-Cap Transport
 - Necessary to facilitate transition to competitor – owned switches where scale allows

Sources of Impairment-Retail Mass Market Competitors

- Line Sharing and Line Splitting:
 - Mass market broadband competition is not sustainable if carriers must enter both voice and broadband markets at once using own facilities
 - Because of “incentives” to ILECs, broadband competitors can only enter the market in a very facilities-intensive way
 - It is far from clear whether any carrier will be able to provide mass-market voice services using its own facilities

Sources of Impairment-Retail Enterprise Market Competitors

- Retail Enterprise Market:
 - DS1/DS3 Loops/Transport: All those identified by FCC previously. See, CompTel/NuVox DS1 Study.
 - Transport alternatives not widely available
 - ILEC conduct barriers: no standards for performing circuit grooming to competitors' own fiber, or competitive wholesale providers
 - Dark Fiber: Even more fixed and sunk costs are required to use ILEC dark fiber, and competitive dark fiber is even less widely available than lit transport services.

Sources of Impairment-Wholesale Competitors

- Wholesale Carriers:
 - DS1/DS3 Loops and Transport
 - Dark Fiber
 - All have the same high fixed and sunk costs noted previously by the Commission
 - Conduct Barriers to Entry:
 - Anticompetitive Terms of Special Access Contracts Are a Major Impediment to Competitive Entry and Expansion

Sources of Impairment-Wholesale Competitors

- The Commission cannot eliminate access to any transmission UNEs without eliminating ILEC-imposed barriers to wholesale competition. CompTel suggests the FCC eliminate:
 - Termination, or “shortfall,” liabilities that extend beyond the initial term of the volume tariff discount;
 - Volume commitments based on significant percentages of prior purchase requirements;
 - Discounts—especially “first dollar” discounts—predicated on moving circuits off competitive carrier networks;
 - Any restrictions which discourage special access purchasers from using their own fiber facilities, or the facilities of a third party.